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IN THE
SUPREME COURT OF THE UNITED STATES

ELROY CHESTER,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether consideration of the *Briseño* factors in assessing an individual's adaptive skills renders Texas' test for mental retardation constitutionally inadequate under *Atkins*?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner, Elroy Chester ("Chester"), was properly convicted and sentenced to die for the brutal murder of Willie A. Ryman III. Chester now claims that he is mentally retarded and his execution would violate the Court's holding in *Atkins v. Virginia*. He requests that the Court review the Texas Court of Criminal Appeals decision to deny his application for state habeas relief. However, Chester's petition is premature, as well as entirely meritless. Consequently, the Court should deny his petition.

OPINION BELOW

The Court of Criminal Appeals denied Chester's successive state writ application on February 28, 2007. *Ex parte Chester*, No. 75,037, slip op., 2007 WL 602607 (Tex. Crim. App. Feb. 28, 2007) (unpublished) (copy included in Appendix A to Chester's petition for certiorari).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

"Cruel and unusual punishments [shall not be] inflicted." U.S. CONST. amend. VIII.

STATEMENT OF THE CASE

I. Course Of Proceedings And Disposition Below

In August of 1998, Chester pleaded guilty to the offense of capital murder and was sentenced to death by a Texas jury. CR

87; 21 RR 50-51.[1] His sentence was automatically appealed to the Court of Criminal Appeals, which affirmed in an unpublished opinion on January 26, 2000. *Chester v. State*, No. 73,193, slip op. (Tex. Crim. App. Jan. 26, 2000). Chester did not petition the Court for certiorari review.

On November 17, 1999, Chester filed a state application for a writ of habeas corpus with the trial court in which he argued that his death sentence violated an Eighth Amendment proscription against executing mentally retarded offenders. 1 SHCR-01 11-12, 30-34. On May 31, 2000, the Court of Criminal Appeals found that the Constitution did not bar the execution of individuals with mental retardation and denied habeas corpus relief. *Ex parte Chester*, No. 45,249-01 (Tex. Crim. App. May 31, 2000) (*per curiam*) (unpublished order).

On May 22, 2001, Chester filed a petition for writ of habeas corpus with the federal district court. During the pendency of Chester's petition the Court decided *Atkins*, holding that the execution of mentally retarded offenders violates the Eighth Amendment's prohibition against cruel and unusual punishments. 536 U.S. 304. Soon thereafter, the district court entered an order conditionally granting Chester's federal writ petition. *Chester v. Johnson*, No. 5:00-CV-152, slip op. (E.D. Tex. Jul. 26, 2002) (unpublished).

The State appealed to the United States Court of Appeals for the Fifth Circuit. Finding Chester's claim unexhausted, the Court of Appeals remanded the case to the district court with

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[1] As a reference, "CR" refers to the clerk's record of pleadings and documents that were filed with the trial court; "RR" refers to the court reporter's transcript of the trial proceedings; "SHCR-01, -02" refer to the clerk's record of pleadings and documents filed during Chester's first and second state writ proceedings, respectively; and "SHRR-02" refers to the court reporter's transcript of Chester's second state writ proceedings. All references are preceded by volume number and followed by page number, where applicable.

instructions to dismiss the petition without prejudice in order for Chester to pursue his claim in the state court. *Chester v. Cockrell*, No. 02-41152 (5th Cir. Feb. 26, 2003) (not designated for publication).

The Court of Criminal Appeals denied relief after the trial court found the evidence insufficient to show that Chester is mentally retarded. *Ex parte Chester*, Application No. 75037. The instant petition for a writ of certiorari followed.

II. Facts of the Crime

On the evening of February 6, 1998, Chester broke into a house in Port Arthur, Texas, while seventeen-year-old Erin DeLeon ("Erin") was at home alone with her one-and-a-half-year-old son, Tony. 18 RR 5-11. Chester grabbed Erin by the ponytail and put a gun to the back of her head, demanding any jewelry or money that was in the house. *Id.* at 12-17. Erin complied and led Chester into the bedrooms, where she surrendered various pieces of jewelry. *Id.* at 17-21. Chester then directed Erin back into the living room and ordered her to turn off all the lights and draw the blinds. *Id.* at 21-22. However, the two were interrupted when Erin's younger sister, Claire DeLeon ("Claire"), returned home with her boyfriend, Tim. *Id.* at 23-25. Chester confronted Claire and Tim at gunpoint and demanded any jewelry or money that they might have. *Id.* at 25-29. He then ordered the pair into the bathroom. *Id.* at 30.

Once Chester was alone again with Erin, he ordered her to take off her clothes and covered her eyes with duct tape. *Id.* at 30-32. He then called for Tim to come into the dining room, where he ordered him to take of his clothes and duct taped his head, hands and legs. *Id.* at 32-34. Chester then dragged Tim into one of the bedrooms. *Id.* at 34. When he returned, Chester called for Claire to come into the dining room and told her to take off her clothes. *Id.* at 35. He taped Claire's eyes and had the two naked

sisters lie next to each other on the floor. *Id.* at 35-36. Chester then raped Erin. *Id.* at 38. He then pulled her up by the hand, sat in a chair, and forced her to perform fellatio. *Id.* at 38-39. As he did so, he held a gun to Erin's forehead and told her that he hoped she would "bite it so he could blow [her] head off." *Id.* at 40. After Chester finished with Erin, he forced Claire into oral sex and repeated the same threat. *Id.* at 41.

At approximately the same time, the girls' uncle, Willie Ryman ("Ryman"), arrived at the house to check on his nieces with his girlfriend, Marcia Sharp ("Marcia"). *Id.* at 41, 61-62. As Marcia waited in the car, Ryman entered the house through the back door. *Id.* at 62-64. Chester met Ryman at the door and killed him by shooting him once through the torso. 17 RR 133-34; 18 RR 42-43. Chester initially fled from the house, but then turned and tried to get back inside. 18 RR 43-44, 65-68. However, he found that the door had been locked behind him. *Id.* at 65-68. Chester then turned his attention to Marcia, who still sat in the driveway inside Ryman's car. *Id.* at 69-70. When Chester was unable to get in through the locked car door, he began to shoot at the door in an attempt to "pop" the lock open. *Id.* at 70-72. As Marcia screamed for help, Chester backed away, looked at Marcia, and fired two shots at her. *Id.* He then retreated down the street. *Id.* at 73.

After Chester's arrest, he provided police with a written statement admitting to the burglary, rapes and murder. 25 RR at Exhibit 118, pp. 4-7. Police also located the murder weapon and the stolen jewelry hidden inside Chester's house. 18 RR 88-96, 161-63; 19 RR 91-96. Finally, DNA testing on the semen taken from Erin on the night of the murder matched Chester's DNA profile. 18 RR 140-41, 150-51; 19 RR 36-37, 46-47.

The evidence presented at trial also revealed that Chester had committed a string of similar crimes in the months leading up

to the Ryman murder.[2] On August 3, 1997, six months before the murder of Willie Ryman, Chester burglarized the home of Kenneth Risinger. 16 RR 35-40; 19 RR 109; 25 RR at Exhibit 118, pp. 3-4. There, he obtained the .380 semi-automatic pistol that he later used to shoot several victims.[3] 16 RR 40; SX 118. Six days later, Chester broke into the home of ten-year-old Rolaycia Mouton while wearing a hockey mask. 16 RR 44; 17 RR 104; 25 RR at Exhibit 122. Chester then forced Rolaycia into a closet, tied her up with tape, and anally raped her. 17 RR 104; RX 122; *see also* 16 RR 62; 18 RR 147-48; 19 RR 26-29, 78.

On the night of August 16, 1997, Chester attempted to burglarize two homes and ended up shooting the residents. First, Chester awoke sixteen-year-old Oscar Morales by shouting through his bedroom window and demanding money. 16 RR 75-76; SX 121, p. 2. When Morales tried to leave the room, Chester shot him in the leg. 16 RR 75-76; 25 RR at Exhibit 121, p. 2. Later that evening, Chester awakened Matthew Horvarich in a similar manner. 16 RR 84-89; 25 RR at Exhibit 121 p. 2. When Horvatch got up and came to the window, Chester shot him in the shoulder. 16 RR 89; 25 RR at Exhibit 121, p. 2.

On September 20, 1997, Chester murdered seventy-eight-year-old John Sepeda during another burglary. Sepeda, who had

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[2] Even before Chester's arrest, Port Arthur police had recognized that the series of recent burglaries, assaults, rapes and murders in the Port Arthur area shared a similar *modus operandi*. 16 RR 34, 93, 106; 17 RR 24; 18 RR 84. For instance, at many of the burglarized homes, Chester would cut the telephone lines, unscrew outdoor security lights, and wear a mask to conceal his identity. *See, e.g.*, 16 RR 39, 98-99; 17 RR 17, 104, 117-18, 123; 18 RR 9-10.

[3] The evidence adduced at trial suggested that Chester used the .380 in the shooting deaths of Willie Ryman, John Sepeda, Cheryl DeLeon, Etta Stallings, and Albert Bolden. *See, e.g.*, 16 RR 106 (.380 shell casing at Sepeda crime scene); 18 RR 159-63 (bullets recovered from bodies of Ryman, DeLeon, Stallings, and Bolden matched characteristics of .380 found at Chester's house). Chester apparently attempted to use some object to alter the physical characteristics of the barrel. 18 RR 158, 163-64. He also filed off the gun's serial number. 16 RR 27; 18 RR 164.

been sleeping in his bedroom with his wife and grandchild, apparently awoke and was surprised by Chester. 16 RR 101-03; 25 RR at Exhibit 117, pp. 2-4. Chester then fired a single bullet into Sepeda's chest and fled with various pieces of property. 16 RR 101-02; 25 RR at Exhibit 117, pp. 2-4.

On November 15, 1997, Chester murdered eighty-seven-year-old Etta Mae Stallings during a burglary of her home. Chester entered the home through an open window, and ultimately shot Stallings through the throat when he found her in her bedroom. 16 RR 112-19; 25 RR at Exhibit 119, pp. 2-3. After he killed Stallings, Chester went to a nearby home and watched two women through an open bedroom window. 25 RR at Exhibit 119, pp. 3-4. Chester then fired his gun through the window several times, striking the two women and their dog. 17 RR 14-17; 25 RR at Exhibit 119, pp. 3-4.

On November 20, 1997, Chester murdered forty-year-old Cheryl DeLeon, whom he had worked with at a nearby Luby's cafeteria. 17 RR 27-28; 25 RR at Exhibit 120, pp. 3-4. Chester surprised DeLeon in the driveway of her home as she approached her back door. 17 RR 27-33; 25 RR at Exhibit 120, pp. 3-4. Chester attempted to rob her, and then shot her through the neck. 25 RR at Exhibit 120, pp. 3-4.

On December 7, 1997, Chester shot Lorenzo Coronado in the head as Coronado returned to his home. 17 RR 53-59; 19 RR 99; 25 RR at Exhibit 121, p. 3. Chester then stole Coronado's wallet and left him for dead. 19 RR 99; 25 RR at Exhibit 121, p. 3.

Finally, in late December, 1997, Chester murdered his brother-in-law, Albert Bolden, after they broke into a house together. 17 RR 63-69; 18 RR 161-63; 19 RR 101; 25 RR at Exhibit 118, pp. 2-3. Chester ultimately explained to police that he had murdered Bolden because Bolden had set him up with a

transvestite and then teased him about the encounter. 19 RR 107-08.

III. The *Atkins* Hearing

As more fully explained below, the State of Texas uses a three-part test to determine whether individuals fall within the range of mental retardation sufficient to render a sentence of death unconstitutionally cruel. *See* Argument, Section II(B), *infra*. Under this definition, a person is within the range if he has three characteristics: (1) significantly subaverage general intellectual functioning (an IQ of about 70 or below); (2) related limitations in adaptive behavior; and (3) onset of the first two characteristics before the age of eighteen. *Ex parte Briseño*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004). The following evidence was presented.

A. Intellectual Functioning And Onset Before Eighteen

In March 1977, when he was seven years old, the Port Arthur Independent School District (PAISD) administered the Wechsler Intelligence Scale for Children (WISC-R) to Chester. 2 SHRR 96-97. Chester received a verbal score of 77, a performance score of 65, and a full-scale score of 69. *Id.* at 95-97. The PAISD again administered the WISC-R to Chester in March 1982, when Chester was twelve years old. *Id.* at 98. That time he received a verbal score of 64, a performance score of 59, and a full-scale score of 69. *Id.* The PAISD administered the WISC-R a third time in February 1983, when Chester was thirteen years old. Chester received a verbal score of 70, a performance score of 87, and a full scale score of 77. *Id.* at 100. The Texas Department of Corrections administered the Wechsler Adult Intelligence Scale to Chester in 1987, when Chester was eighteen years old. 2 SHRR 102. Chester received a verbal score of 70, a performance score of 69, and a full scale score of 69. *Id.* at 103. Evidence regarding onset before the age of eighteen was not disputed. *Ex parte*

Chester, Application No. 75,037 at 4.

B. Adaptive Functioning

With respect to the second characteristic of mental retardation, the Court of Criminal Appeals has developed seven criteria—the *Briseño* factors—to identify individuals whose adaptive functioning is sufficiently limited. Those criteria are:

(1) Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?

(2) Has the person formulated plans and carried them through or is his conduct impulsive?

(3) Does his conduct show leadership or does it show that he is led around by others?

(4) Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

(5) Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

(6) Can the person hide facts or lie effectively in his own or others' interests?

(7) Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense

> require forethought, planning, and complex execution of purpose?

Ex parte Briseño, 135 S.W.3d at 8-9.

The Court of Criminal Appeals summarized the findings of the trial court with respect to these factors:

> The trial court's findings addressed all seven evidentiary factors listed in *Briseño*, and noted carefully how [Chester] had failed to persuade the trial court on each one. For example, in response to the first *Briseño* question ("Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?"), the trial court found that [Chester] had been classified during his school years as "learning disabled," rather than as mentally retarded. Conflicting testimony was presented regarding the flexible and often confusing standards under which such classifications were made in the Port Arthur Independent School District. Nevertheless, the trial court considered and found more credible the testimony of Vicki Pitman, a diagnostician and witness for the State. Pitman testified that [Chester]'s school records labeling him as learning disabled were accurate, and that having a learning disability is not the same thing as being mentally retarded. The trial court likewise was unpersuaded by [Chester]'s witness Elizabeth Segler, who was [Chester]'s teacher and who said that, in her opinion, [Chester] was moderately retarded. The trial court found Segler's testimony to be contradictory, in that she also

testified that [Chester] was "certainly" capable of learning if given proper teaching methods, which is also consistent with having a learning disability.

The trial court made similar findings in regards to the planned, rather than impulsive, nature of [Chester]'s conduct as shown by the facts of the case itself, as well as to the fact that in all of his crimes he acted independently of others instead of being led around. The court found no evidence in either the trial record or the hearing to establish that [Chester]'s conduct in response to external stimuli was irrational or inappropriate, regardless of its social acceptability.

As to whether [Chester] responded coherently and rationally to oral or written questions, the trial court considered the testimony of both parties' experts regarding an evaluation of [Chester] conducted by Dr. Ed Gripon, the State's expert. The court was more persuaded by Dr. Gripon's testimony that [Chester] was able to converse with him coherently on a wide variety of topics, including current politics, the concept of parole violations, and many specific facts of the crimes to which [Chester] had confessed. The trial court also noted the discrepancy in credentials between the two experts, particularly that, while Dr. Gripon had been practicing in the field of psychiatry for thirty-two years and had testified in Texas courts on issues of mental retardation numerous times, [Chester]'s expert had been licensed for six years, in which time he had held a total of seven jobs, none for longer than two years. The trial court found the State's expert's testimony to be more credible.

> The trial court also found that [Chester] was capable of hiding facts and lying to protect his own interests, as demonstrated by the episode in which he told the investigators that he would take them to where he had hidden his gun, all the while apparently planning to get to the gun himself before the investigators could. Finally, the court found that the specifics of the various crimes to which [Chester] confessed, including the use of masks and gloves, his practice of cutting exterior phone lines before entering homes to burglarize, and his deliberate targeting of victims like Cheryl DeLeon and his brother-in-law Albert Bolden, showed persuasively that [Chester] was capable of forethought, planning, and complex execution of purpose.

Ex parte Chester, No. 75,037 at 8-10.

ARGUMENT

I. The Question Presented for Review Is Unworthy of the Court's Attention.

Chester seeks review of the Court of Criminal Appeals' decision to deny his state habeas application. However, since there is no constitutional right to state habeas corpus proceedings or appointed counsel therein, it follows that the denial of a state habeas application does not present a federal question for certiorari review. Justice O'Connor described the role of state habeas corpus proceedings as follows:

> A post-conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid

> criminal judgment. Nothing in the Constitution requires the States to provide such proceedings ... nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings.

Murray v. Giarratano, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring).

Similarly, Justice Stevens has noted that:

> This Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring). Chester has counsel and his *Atkins* claim is currently pending in federal habeas proceedings. Thus, it appears that "the more appropriate avenue" is available to Chester.

II. The State Court Reasonably Applied The Law Established By *Atkins*.

Chester claims that the state court's reliance on the *Briseño* factors "disregards the scientific criteria for measuring adaptive functioning" and ignores the Court's pronouncements in *Atkins*. Petition at 18. Specifically, he objects with the *Briseño* factors because they fall outside the American Association on Mental Retardation ("AAMR") and American Psychiatric Association ("APA") definitions. *Id.* However, Chester's claim for habeas relief fails because *Atkins* does not mandate the adoption of a particular definition of mental retardation and the standard adopted

by Texas is constitutionally adequate.

A. *Atkins* Does Not Mandate The Adoption Of A Particular Definition Of Mental Retardation.

In *Atkins* the Court held that "the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender." 536 U.S. at 321 (internal quotation omitted). The Court noted that, "[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded." *Id.* at 317. "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Id.* The Court then stated it would fall to the states to determine precisely how to implement this constitutional mandate:

> As was our approach in *Ford v. Wainwright* with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."

Id. at 318 (citations omitted).

B. The Texas Test For Mental Retardation Is Constitutionally Adequate.

While the Supreme Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences," it cited with approval the following definitions of mental retardation:

> The American Association of Mental Retardation (AAMR) defines mental retardation as follows: "*Mental retardation* refers to substantial

limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18."[4]

The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70.

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[4] Although the *Atkins* Court used the AAMR's 9th edition definition, in May 2002 the AAMR released a 10th edition containing a somewhat different definition: "Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." *Compare* AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (9th ed. 1992) *with* AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (10th ed. 2002).

Atkins, 536 U. S. at 309 n. 3 (internal citations omitted); *id.* at 317 n. 22.

The Texas Court of Criminal Appeals has adopted the 1992 AAMR definition, explaining that, although Texas has not yet enacted statutory provisions to implement the *Atkins* decision, "[u]ntil the Texas Legislature provides an alternate statutory definition of 'mental retardation' for use in capital sentencing, we will follow the AAMR or [TEX. HEALTH & SAFETY CODE] section 591.003(13)[5] criteria in addressing *Atkins* mental retardation claims." *See Ex parte Briseño*, 135 S.W.3d at 8; *see also Morris v. Dretke*, 413 F.3d 484, 496, 497-98 (5th Cir. 2005) (acknowledging *Briseño*'s adoption of AAMR definition).

In Texas, adaptive behavior is defined as "the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group." TEX. HEALTH & SAFETY CODE § 591.003(13). The AAMR and APA also describe the factors in evaluating adaptive functioning. *Atkins*, 536 U.S. at 309 n.3. For example, the 1992 AAMR definition refers to "limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." *Id.* The APA guidelines require "significant limitations in adaptive functioning" in at least two of its list of similar skill areas. *Id.* However, just as with the assessment of cognitive IQ, adaptive functioning may be influenced by various factors independent of the individual's mental capabilities, including education, motivation, cooperation, background, personality characteristics, social and vocational opportunities, and other mental disorders or medical conditions. *See* AMERICAN

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[5] Under the Texas Health and Safety Code, "'mental retardation' means significantly sub-average general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." TEX. HEALTH & SAFETY CODE § 591.003(13).

PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (Text Revision, 4th ed. 2000) at 42.

The Court of Criminal Appeals recognized that opinions from forensic experts on adaptive functioning can be found for both sides in most cases. *Ex parte Briseno*, 135 S.W.3d at 8-9. However, it noted that, ultimately, the "issue of whether this person is, in fact, mentally retarded for purposes of the Eighth Amendment ban on excessive punishment is one for the finder of fact, based upon all of the evidence and determinations of credibility." *Id.* at 9. Thus, the court developed the *Briseño* factors for use in assessing whether an individual's adaptive functioning is sufficiently limited. As noted above, these include: (1) whether those who knew him during his developmental state considered him to be mentally retarded; (2) whether he has formulated and carried out plans; (3) whether his conduct shows that he is a leader; (4) whether his conduct in response to external stimuli is rationale and appropriate, regardless of whether it is socially acceptable; (5) whether he responds coherently and rationally to questioning; (6) whether he can effectively lie to further his or others' interests; and (7) whether the crime of conviction required planning and complex execution. *Id.* at 8.

Contrary to Chester's assertions, the Court of Criminal Appeals, did not manufacture these factors out of thin air. Rather, they simply summarized the characteristics of mental retardation set forth by this very Court in *Atkins*. In *Atkins*, the Court noted that some "characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards." Specifically, mentally retarded individuals:

> . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to

> understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Atkins, 536 U.S. at 318.

The *Briseño* factors parallel and are plainly derived from this description.[6]

Since *Briseño*, these evidentiary factors have been applied by the Court of Criminal Appeals in numerous cases.[7] The Tennessee Court of Criminal Appeals has adopted word-for-word much of this analysis and all of the *Briseño* factors. *Van Tran v. Tennessee*, 2006 WL 3327828, No. W2005-01334-CCA-R3-PD,

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[6] These factors also reflect the fact that "those in the mental health profession should define mental retardation broadly" for social services purposes, while the criminal law "must define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Briseño*, 135 S.W.3d at 6. As the *Briseño* court explained, "[s]ome might question whether the same definition of mental retardation that is used for providing psychological assistance, social services, and financial aid is appropriate for use in criminal trials to decide whether execution of a particular person would be constitutionally excessive punishment." *Id.* at 8.

[7] These cases include *Ex parte Elizalde*, No. 48957-02, 2006 WL 235036 at *3 (Tex. Crim. App. Jan. 30, 2006) (unpublished); *Ex parte Taylor*, No. 48498-02, 2006 WL 234854 *3-4 (Tex. Crim. App. Feb. 1, 2006) (Johnson, J, concurring) (unpublished); *Ex parte Modden*, 147 S.W.3d 293, 296-98 (Tex. Crim. App. 2004); and *Ex parte Blue*, --- S.W.3d ----, 2007 WL 676194 at *7 (Tex. Crim. App. Mar. 7, 2007) (not yet released for publication)

slip op., *23-24 (Tenn. Crim. App. Nov. 9, 2006).[8] The United States District Court for the Western District of Texas, San Antonio Division, examined the *Briseño* evidentiary factors and found that they represented "an objectively reasonable application of what is admittedly a far-from crystal-clear federal constitutional standard," in concluding that the state habeas court's application of the factors was "eminently reasonable." *Rodriguez v. Quarterman*, 2006 WL 1900630, No. SA-05-CA-659-RF, slip op. at *12-13 (W.D. Tex. July 11, 2006).

The Fifth Circuit has also dismissed Chester's contention that *Atkins* creates any criteria for a state's definition of mental retardation. *Clark v. Quarterman*, 457 F.3d 441, 445 (5th Cir. 2006), *cert. denied*, 127 S.Ct. 1373 (Feb. 26, 2007). Clark raised an analogous challenge to *Briseño*'s approach on IQ scores. "Although the [*Atkins*] Court did refer to the clinical definitions of mental retardation promulgated by the AAMR and the []APA[], it did not dictate that the approach and the analysis of the State inquiry must track the approach of the AAMR or the APA exactly... Therefore it is not 'clearly established Federal law as determined by the Supreme Court of the United States' that state court analysis of subaverage intellectual functioning must precisely track the AAMR's recommended approach." *Id.* In fact, the Fifth Circuit has looked with favor on the *Briseño* jurisprudence and its adoption of the HSC 591.003(13) definition on numerous occasions. *See Moore v. Quarterman*, 454 F.3d 484, 491-93 (5th Cir. 2006); *Clark v. Quarterman*, 457 F.3d at 444-47; *Moreno v. Dretke*, 450 F.3d 158, 163 (5th Cir. 2006) (state court's use of Briseno factors to assess adaptive functioning not unreasonable

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[8] The Tennessee court affirmed the denial of relief and noted "Despite the testimony of the Petitioner's experts and the fact that the State presented no evidence, the trial court rejected the results of the standardized tests and the opinions of the Petitioner's experts. The Petitioner implies that this fact, alone, is error. . . we note that the trial court is neither bound by the opinion of expert witnesses nor by test results. Rather, the court may weigh and consider all evidence bearing on the issue of retardation." *Id.* (citing *In re: Anderson Hawthorne, Jr.*, 105 P.3d 552, 559 (Cal. 2005) and *Morrison v. State*, 583 S.E.2d 873, 876 (Ga. 2003)).

application of *Atkins*), *cert. denied*, 127 S. Ct. 935 (2007); *In re Salazar*, 443 F.3d 430, 432 (5th Cir. 2006); *United States v. Webster*, 421 F.3d 308, 312 (5th Cir. 2005); *In re Hearn*, 418 F.3d 444, 446-47 (5th Cir. 2005).

C. *Briseño* Does Not Hold That Antisocial Personality Disorder And Mental Retardation Are Mutually Exclusive.

Ancillary to his primary claim, Chester asserts that *Briseño* stands for the proposition that antisocial personality disorder and mental retardation are mutually exclusive and the *Briseño* factors are only a mechanism for separating the two. Petition at 18-19. But *Briseño* holds no such thing. The Court of Criminal Appeals stated in this very case that the *Briseño* factors are a "series of questions to help fact-finders determine whether applicants have 'deficits in adaptive behavior.'" *See Ex parte Chester*, No. 75,037, slip op. at 3; *see also Moreno*, 450 F.3d at 164 (observing that the *Briseño* factors are "criteria for courts to use in assessing whether a prisoner's 'adaptive functioning' is sufficiently limited").

Chester extrapolates from the *Briseño* facts a holding where none exists. In *Briseño* the defense expert diagnosed mental retardation while the State's expert found no mental retardation but did find evidence consistent with antisocial personality disorder. *Ex parte Briseño*, 135 S.W.3d at 17. However, *Briseño* never explicitly or implicitly holds that it is impossible to have both antisocial personality disorder and mental retardation. Chester's interpretation is erroneous and ignores how the *Briseño* factors have been used in practice—including in his own case.

D. Chester's Claim Of That There Is A Systemic Effort By Texas To Execute The Mentally Retarded Is Unfounded.

In Appendix D, Chester provides a list of post-*Briseño*

mental retardation decisions. He asserts that the Court of Criminal Appeals "track record [in evaluating mental retardation claims] manifests that Texas plainly intends to continue to execute people who commit heinous crimes, even when they suffer mental retardation." Petition at 19. However, Chester lacks standing to challenge the application of the law in another's case. Standing is a vital component of the "case or controversy" requirement under Article III, section 2 of the Constitution and is jurisdictional in nature. U.S. CONST. art. III, § 2; *Allen v. Wright,* 468 U.S. 737, 750 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 475-76 (1982).[9] Chester lacks standing to challenge the decisions in these other cases or to express generic complaints about *Briseño* outside of its application in his case.

Notwithstanding, Chester these cases do not show that Texas "systemically allows the execution of mentally retarded offenders." Petition at 19. Chester's citations show that the Court of Criminal Appeals found seven out of thirty-three individuals mentally retarded. *Id.* Chester fails to provide any basis of comparison that proves that this is unusual. Likewise, Chester cites two cases in which a federal district court reversed decisions where the Court of Criminal Appeals found insufficient evidence of mental retardation. *Id.* at n. 32. Again, Chester fails provide any basis of comparison that would suggest that this is unusually high rate of reversal. His assertions here are simple opinion and of no probative value.[10]

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[9] The "irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact[.] ... Second, there must be a causal connection between the injury and the conduct complained of .... Third, it must be likely ... that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992) (internal quotation marks and citations omitted).

[10] Of course, it goes without saying that simply because an error was made in another case, it does not follow that any error was made in Chester's case.

CONCLUSION

For the foregoing reasons, the Court should deny Chester's petition for a writ of certiorari.

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